IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO. 18 OF 2004

Mohammad Asraf Koloo,
presently lodged in
Central Jail, Aguada,
Sinquerim, Bardez, Goa. ... Appellant

versus

State of Goa,
as represented by
Officer-In-Charge,
Calangute Police Station,
Calangute, Bardez, Goa. ... Respondent

Mrs. Asha Dessai, Advocate for the Appellant.

Mr. S. N. Sardessai, Public Prosecutor for the State.

CORAM: N. A. BRITTO, J.

DATE : 28TH JANUARY, 2005 &
3RD FEBRUARY, 2005.

ORAL JUDGMENT

This appeal is preferred by the accused in Special Criminal Case No. 9 of 2001 against the Judgment/Order dated 8-12-2003 convicting and sentencing the accused under Section 20(b)(ii) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (Act, for short) to undergo Rigorous Imprisonment for 10 years and fine of Rs.1,00,000/-, in default to undergo Simple Imprisonment for 1 year w.e.f. 14-12-2000.

2. Briefly stated, the case of the prosecution, against the accused is that P.S.I. Gundu Naik of Calangute Police Station had prior reliable information that on 14-12-2000 a person aged about 28 years, 5.6 inches tall, wearing a brown T shirt and dark colour full pant and carrying a black colour sling bag on his shoulder would be coming to Khobrawado, Calangute, near a small chapel situated by the side of Hotel Calangute Mahal for delivery of consignment of charas to his customer at about 19.00 hours, and, after reducing the said information into writing the said P.S.I. Naik informed Police Inspector Banaulikar, and after confirming the identity, conducted the raid and caught the accused who was found with 1.15 kgs. of charas which were weighed, packed and sealed and the accused was appraised of his right under Section 50 of the Act.

3. The prosecution examined 7 witnesses to prove the charge against the accused. P.W.3, Sebastiao Quadros, P.W.4, P.I. Gundu Naik, P.W.5, Dy.S.P. Arvind Gawas and P.W.7, Dy.S.P. Deu Banaulikar were examined by the prosecution to prove the factum of accused being caught in possession of the said charas. P.W.2, Constable Krishna Shetgaonkar and P.W.6, Umesh Shet were examined to prove the factum of safe custody of the seized article after seizure and its onward transmission to the laboratory where they were examined by Junior Scientific Officer, P.W.1, Shri Kaissare who found, on analysis, that the seized article was in fact charas.

4. The learned Special Judge after analysing the evidence of the prosecution witnesses came to the conclusion that the prosecution had established that the accused was found in possession of the said charas and that after seizure the same were kept in the custody of Police Constable Shetgaonkar so as to avoid any tampering. The learned Special Judge also came to the conclusion that the accused had no document to prove its legal possession and, therefore, proceeded to convict and sentence the accused, as aforesaid.

5. The first submission of Mrs. Asha Dessai, the learned Counsel of the accused is that Section 50 of the Act was not complied with.

Section 50 of the Act reads as follows:-

> "**Section 50 Conditions under which search of persons shall be conducted** - (1). When any officer duly authorised under Section 42 is about to search any person under the provisions of Section 41, Section 42 or Section 43, he shall if such person so requires, take such person without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in Section 42 or to the nearest Magistrate"

6. In fact, the submission of the learned Counsel Mrs. Dessai, is that the evidence led by the prosecution on this aspect cannot be accepted because it differs from witness to witness. For example, pointing out to the evidence of P.W.4, Gundu Naik, who had organised the raid, Mrs. Dessai submits, that he had stated that he had explained the requirements of Section 50 of the Act to the accused in the following words:-

> "Ye Apka Haq Bandta hai ki apki talashi kisi Magistrate Ke samne Ya Rajpatrik Adhikarik ke samne li ja sakti hai agar aap chahe to".

while P.W.3, Quadros, the panch witness, has stated that P.S.I. Naik, had used the same words(in English) i.e. to say a Gazetted Officer and Magistrate while making the offer to the accused while again P.W.5, Dy.S.P. Gawas, has stated that he could not reproduce the offer made in verbatim in Hindi and that he could not recall whether P.W.4, Gundu Naik, had used Hindi equivalent for the words Gazetted Officer and Magistrate. It is the submission of the learned Counsel that in the light of the said discrepancies it could not be said that the offer under Section 50 of the Act was made at all.

DATE: 3RD FEBRUARY,2005.

7. In my view, the evidence of the aforesaid witnesses cannot be appreciated in a very hypertechnical manner, as submitted by learned Advocate Mrs. Dessai. It has been uniformly stated by all the prosecution witnesses who were present at the time of the search of the accused, that P.W.4, Gundu Naik, had conversation with the accused in Hindi language.

As can be seen from the statement of P.W.4, Naik, in explaining the provisions of Section 50 of the Act to the accused, P.W.4, Naik, used the word "Magistrate" in English and the word “Gazetted Officer” translated into Hindi. It is to be noted that P.W.3, Quadros, was deposing after a lapse of almost a year and it would certainly have been difficult for him to reproduce the exact conversation which took place between P.W.4, Naik and the accused. That slight discrepancy in not reproducing the exact words used at the time of the seizure of charas from the accused is not sufficient to discard the entire evidence of the said three witnesses, as regards the compliance of Section 50 of the Act. I am, therefore, not inclined to accept the submission of learned Advocate Mrs. Dessai that in this case there has been no compliance under Section 50 of the Act.

8. Next, Mrs. Dessai has submitted that P.W.3, Quadros, was not an independent witness and not a resident from the locality and the fact that he stood as a panch witness twice on the same day shows that he was out to oblige the Police. Mrs. Dessai, has placed reliance on a decision of this Court in the case of **Smt. Sumati Joseph Naida** v. **The State of Maharashtra** (2000 ALL MR(Cri) 582). This was a case where the evidence of the Officer who took the search of accused no.2 materially differed from the version given by the witness to the search and an independent lady panch who was present was not examined by the prosecution to corroborate

the testimony of the Officer who conducted the search and in the circumstances the Court held that the non examination of the said independent lady panch witness was a strong circumstance to favour the accused. In my view, the said observations cannot be applied to the case at hand. P.W.3, Quadros, might have been a resident of Dona Paula who otherwise was running a workshop at St. Inez, Panaji. However, he had explained that at the relevant time he was staying at Kamat Holiday Home at Calangute and that P. I. Banaulikar, was aware that he was staying at Kamat Holiday Home. He admitted that on the same morning he had acted as a panch witness for the same Police Station but he was called by P.S.I. Albuquerque on his mobile phone in connection with the said raid but as far as the raid in the present case was concerned he was called by one constable. In my view, only because P.W.3, Quadros, acted as a panch witnesss on the same day in respect of two panchanamas conducted by two different Officers of the same Police Station, it could not be said that P.W.3, Quadros, was a person who would be at the back and call of the Police so as to oblige them in stating facts which did not take place in his presence. Although, P.W.3, Quadros, was not from the locality he was otherwise available in the locality. He appears to be a person, as stated by him, running his business of a workshop at St. Inez. In a similar case, the Supreme Court in the case of **Durand Didier** v. **Chief Secretary, Union Territory of Goa**(AIR 1989 SC 1966) referring to the case of **Sunder Singh**

v. **State of U.P.**(AIR 1956 SC 411) observed that if pancha witnesses are not respectables of the same locality but from another locality, it may amount only to an irregularity, not affecting the legality of the proceedings and that it is a matter for Courts of fact to consider. Since, P.W.3, Quadros, was found residing at Calangute where the search and seizure were made, P.W.3, Quadros, could be considered to be a person from the locality. That apart, nothing has been brought out in his cross-examination which would make his evidence unreliable or of a doubtful character. In my opinion, P.W.3, Quadros, is an independent witness and he has sufficiently corroborated the evidence of other Police witnesses who were present at the time of the seizure of the charas from the accused.

9. Another submission made by learned Advocate Mrs. Dessai and for the first time before this Court, is that the accused is a person who did not know to sign and, therefore, he could not have signed the seizure panchanama or the receipt having received a copy of the same. It is true that the accused in the course of the trial did not sign any documents, documents like a Vakalatnama or plea taken before the trial Court or for that matter the statement recorded under Section 313 of Cr.P.C. However, all the witnesses who were present at the time of seizure have consistently deposed that the accused did sign the panchanama as well as the other

articles which were put in the envelopes and sealed. It is quite possible that in the course of the trial, the accused designedly feigned ignorance that he did not know to sign.

10. In my view, the learned trial Court has rightly relied on the evidence of P.W.4, Naik, P.W.3, Quadros, P.W.5, Gawas and P.W.7, Banaulikar to come to the conclusion that the seized articles-charas were found in the possession of the accused. The learned trial Court has also rightly believed the evidence of P.W.6, Umesh Shet to come to the conclusion that the said seized articles were kept in safe custody from the time they were seized and sent to the Laboratory for analysis. P.W.1, Mahesh Kaissare, has confirmed that the said articles were received by him in sealed condition and without any tampering. In my view, the conviction of the accused based on the evidence produced by the prosecution, which was reliable, could not be faulted.

11. Lastly, learned Counsel Mrs. Dessai, has referred to the case of **Sule Kareem** v. **Asstt. Collector of Customs** (1998 ALL MR(Cri) 811) and has submitted that the period of imprisonment for default of payment of fine of Rs.1,00,000/- be reduced to 6 months instead of 1 year, as ordered by the learned trial Court. In the aforesaid case, it appears that the sentence imposed was of 10 years Rigorous i*mprisonment a*nd fine of

Rs.1,00,000/- and in default 2 years Rigorous Imprisonment were imposed and which were reduced by this Court from 2 years Rigorous Imprisonment to 6 months Rigorous Imprisonment. In fact, no reason has been assigned by the learned Counsel of the accused as to why the said Simple Imprisonment for 1 year should be reduced to 6 months. Section 65 of the Indian Penal Code only provides that the term for which the Court directs the offender to be imprisoned in default of payment of a fine shall not exceed one-fourth of the term of imprisonment which is a maximum fixed for the offence, if the offence be punishable with imprisonment as well as fine. I am not inclined to interfere with the exercise of discretion shown by the learned trial Court in awarding 1 year Simple Imprisonment in default of payment of Rs.1,00,000/-, in the absence of any reason being assigned or any special circumstances being shown, on behalf of the accused. The reduction done in the case cited does not appear to have been done based on any principle but by considering the facts of that particular case which are different from this case.

12. Consequently, I find there is no merit in this appeal and the same is hereby dismissed.

N. A. BRITTO, J.

RD.